

D.R. NO. 2018-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

CITY OF ATLANTIC CITY,

Petitioner,

-and-

Docket No. CU-2015-004

INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS LOCAL 198,

Employee Organization.

SYNOPSIS

The Director of Representation grants a clarification of unit petition filed by the City of Atlantic City (the City). The City's petition sought clarification of a collective negotiations unit of all uniformed fire department personnel represented by IAFF Local 198 (Local 198). Specifically, the City sought the removal of the titles of Fire Captain, Fire Inspector, Battalion Chief and Deputy Fire Chief from Local 198's unit on the grounds that those titles are supervisory personnel and their inclusion in Local 198's unit with rank and file firefighters generates an impermissible conflict of interest under the New Jersey Employer-Employee Relations Act. The Director, given the conflict of interest created by the inclusion of the Fire Captain, Battalion Chief and Deputy Fire Chief with the rank and file, removes the Fire Captain, Battalion Chief, and Deputy Fire Chief titles from Local 198's unit effective immediately.

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Employee Organization.

Appearances:

For the Petitioner,
Cleary Jacobbe Alfieri Jacobs, LLC, attorneys
(Matthew J. Jacobbe, of counsel)

For the Employee Organization,
O'Brien Belland & Bushinsky, LLC, attorneys
(Mark Belland, of counsel)

DECISION

On September 8, 2014, the City of Atlantic City (the "City") filed a Clarification of Unit Petition seeking clarification of a collective negotiations unit of all uniformed fire department personnel represented by IAFF Local 198 ("Local 198"). The City asserts that the titles of Fire Captain, Fire Inspector, Battalion Chief and Deputy Fire Chief should be removed from Local 198's unit because they are supervisory personnel and their inclusion in Local 198's unit with rank and file firefighters, generates an impermissible conflict of interest under the New

Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq.

Local 198 opposes clarification, asserting that the titles of Fire Captain, Fire Inspector, Battalion Chief and Deputy Fire Chief are appropriately included in Local 198's unit. Local 198 contends that the inclusion of these titles in a unit with rank and file uniformed fire department personnel does not create a conflict of interest. It further contends that an unfair practice charge must be resolved and that a hearing is required to determine the credibility of the parties' witnesses. It also states that "the City was divested of its sovereignty by the State of New Jersey and is now a 'municipality in need of stabilization and recovery' pursuant to the terms of the 'Municipal Stabilization and Recovery Act . . . N.J.S.A. 52:27BBBB, et seq.'" [Hereinafter, "MSRA"]. It further contends that the MSRA is unconstitutional.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. We scheduled investigatory conferences in 2015, 2016, 2017, and received information, certifications, and arguments from the parties. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.6.

I find the following facts.

In support of its petition, the City submitted a memorandum from Vincent Granese, then Acting Fire Chief. The memorandum has numerous attachments, including various internal disciplinary documents from the City's fire department, an organizational chart for the City's fire department, and the New Jersey Civil Service Commission's Job Specification 01506 for Deputy Fire Chief, Job Specification 00856 for Battalion Fire Chief, and Job Specification 01836 for Fire Captain. The City's fire department consists of approximately 286 fire personnel, including 235 rank and file firefighters, two (2) Deputy Fire Chiefs, eight (8) Battalion Fire Chiefs, and 41 Fire Captains.^{1/}

Local 198's unit consists of all of the City's uniformed fire department personnel. In opposition to the City's petition, Local 198 submitted letters dated November 5, 2014, June 26, 2015 and June 20^{2/}, 2017, arguing that the current unit "is proper and

1/ Although the City included the title of Fire Inspector in its petition along with Fire Captain, Battalion Fire Chief, and Deputy Fire Chief, the City asserts that there are currently no Fire Inspectors, and after the petition, all of the City's submissions were strictly limited to Fire Captain, Battalion Fire Chief and Deputy Fire Chief. Thus, we do not consider the title Fire Inspector herein.

2/ In response to Local 198's unfair practice charge referenced in its June 20, 2017 letter, Docket No. CO-2017-277, the Chair of the Commission received a letter dated June 21, 2017 from Timothy Cunningham, Director, Division of Local Government Services, State of New Jersey Department of Community Affairs. In that letter, Director Cunningham notified the Commission that, in accordance with MSRA, "the City of Atlantic City shall not be subject to the

(continued...)

must remain intact." Local 198 alleges that "[o]utside of the chain of command for emergency responses, the department is rather egalitarian," as, "[a]ll bargaining unit members, both rank and file and the disputed titles, are responsible for the performance standards of all other bargaining unit members." Further, Local 198 alleges that, "[n]o bargaining unit members can discipline other members but all bargaining unit members can recommend discipline of other members." Local 198 further alleges that, "[n]one of the disputed titles can hire, fire, or promote any bargaining unit members." Local 198 alleges that, "[a]s a civil service municipality, potential firefighters first take a written test and then a physical test with New Jersey Civil Service Commission."

The City and Local 198 have signed multiple collective negotiations agreements, the most recent of which originally extended from January 1, 2015, through December 31, 2017.

2/ (...continued)

Commission's authority to prevent an unfair practice charge pursuant to N.J.S.A. 34:13A-5.4(a) of the [Act]." See N.J.S.A. 34:13A-5.4(g) ("Upon such notice, neither the Commission, nor any designee, shall have the authority to issue or cause to be served upon any municipality in need of stabilization and recovery any complaint alleging an unfair practice under subsection a. of this section or to hold any hearings with respect thereto"). In response, by letter dated June 23, 2017, the Chair of the Commission notified the parties that "no complaint will be issued nor hearings conducted" regarding the charge.

On November 9, 2016, pursuant to its authority under the MSRA, the Local Finance Board of the New Jersey Department of Community Affairs put Atlantic City under the control of the State, through the Department of Community Affairs, Division of Local Government Services.

Richard Richardella is the designee of the Director of the Division of Local Government Services ("Director"). By certification dated June 7, 2017, Richardella certified that he is the State Fiscal Monitor delegated by the Director and his duties include those set forth pursuant to the authority of the MSRA, including management of staffing needs for the fire department. He also certifies that all of the authority and duties, described below for the titles at issue, are granted pursuant to the powers vested under the MSRA. He further certifies that the City's fire department "is a para-military organization" subject to the Director's authority under the MSRA.

Richardella certifies that there are currently three Deputy Fire Chiefs, six Battalion Fire Chiefs, and 30 Fire Captains employed by the City, along with 164 Firefighters. Richardella certifies that the current salaries were established pursuant to the MSRA.

With regard to supervisory responsibilities, Richardella certifies that Fire Captains supervise the day-to-day activities of Firefighters, Battalion Fire Chiefs supervise the day-to-day

activities of Fire Captains and Firefighters, and Deputy Fire Chiefs supervise the day-to-day activities of Battalion Fire Chiefs, Fire Captains and Firefighters.

With regard to responsibility for setting schedules, Richardella certifies that Deputy Fire Chiefs set and modify work schedules for Battalion Fire Chiefs, Fire Captains and Firefighters.

Richardella attaches a table of organization for the City's fire department, and certifies that "the design of the table of organization is subject to the powers vested in" MSRA. Richardella also attaches the New Jersey Civil Service Commission's Job Specification 01506 for Deputy Fire Chief, Job Specification 00856 for Battalion Fire Chief, and Job Specification 01836 for Fire Captain.

With regard to the authority to implement discipline and effectively recommend discipline, Richardella certifies that "Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains have such authority," and that authority to discipline lower-ranked employees is "not limited to special circumstances." Richardella also attaches examples of disciplinary actions taken and recommended by Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains. These examples include a Deputy Fire Chief recommending discipline of a Firefighter to the Acting Fire Chief, a Battalion Fire Chief recommending discipline of a

Firefighter recruit to the Fire Chief, a Fire Captain recommending discipline of a Firefighter recruit to the Fire Chief, a Battalion Fire Chief and a Fire Captain recommending discipline of two Firefighter recruits to a Deputy Fire Chief.

With regard to the hiring of firefighters, Richardella certifies that after firefighter recruits are accepted into the Fire Academy, Deputy Chiefs, Battalion Fire Chiefs and Fire Captains "have roles in the assessment of a potential firefighter's ability to pass the basic firefighting exams, his or her physical preparedness, and his or her ability and willingness to follow orders and execute the rules and regulations in the framework of the Fire Department's paramilitary structure." Richardella further certifies that if "the assessments of the Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains are positive," then the Firefighter recruit "will generally gain the opportunity to graduate from the Fire Academy and serve as a Firefighter," but if the assessment is negative, "then the recruit's chances of graduation from the Fire Academy and actual service as a Firefighter become much less likely."

With regard to the ability to immediately suspend another employee, reprimand another employee, initiate discipline by writing reports of misconduct, investigate a disciplinary matter, marshal witnesses and evidence before a supervisor, and assess a case, Richardella certifies that Fire Captains can take these

actions against Firefighters, Battalion Fire Chiefs can take these actions against Fire Captains and Firefighters, and Deputy Fire Chiefs can take these actions against Battalion Fire Chiefs, Fire Captains and Firefighters.

With regard to "the final authority to fire and discipline employees," Richardella certifies that these decisions are "recommended by the Fire Captain at the lowest level, then by the Battalion Fire Chief, then by the Deputy Fire Chief, then by the Fire Chief, then by the Business Administrator, then by the Mayor."

With regard to the evaluation of Firefighters, Richardella certifies that "Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains are regularly involved in the apprentice program which is utilized in the evaluation of Firefighters," and all of these supervisory titles "fill evaluation forms out and review copies of them from time to time." Richardella further certifies that Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains are "continually involved in training, observations during fire incidents, and knowledge of the purpose and use of firefighting equipment," and "their subordinates are subject to their continuous criticism when an employee's performance is deficient." Moreover, Richardella certifies that the authority to evaluate and promote is provided to Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains who "have a duty to

provide a written report of such deficient performance to his/her supervisor for corrective action," which is "required as part of their role as superior officers in the Fire Department to ensure the safety of the employees they supervise and the public at large." Richardella further certifies that "evaluations are tied to promotions and/or discipline on every level, up to and including termination from employment."

Richardella attaches the New Jersey Civil Service Commission's Job Specifications for the disputed titles. Job Specification 01506 for Deputy Fire Chief states that the Deputy Fire Chief, "[u]nder the direction of the Fire Chief, assists in the management and discipline of the fire department." The job specification also states that the duties and responsibilities of a Deputy Fire Chief include, but are not limited to, "[a]t fires, takes charge of responding companies, deploys firefighting forces, orders needed reinforcements, and supervises the use of firefighting forces, equipment, and apparatus," "[m]akes inspections of firefighting personnel and equipment to ensure efficient performance," "[c]onducts training classes for subordinates, officers, and firefighters," "[h]as charge of the fire department in the absence of the Fire Chief," and "[s]upervises the establishment and maintenance of personnel and fire records and files." The job specification also requires

that Deputy Fire Chiefs must have the "[a]bility to supervise the efficient performance of firefighters at fires."

Job Specification 00856 for Battalion Fire Chief states that a Battalion Fire Chief, "[u]nder direction of the Fire Chief or a Deputy Fire Chief, assists in the management and discipline of the municipal uniformed fire department by supervising a group of fire companies engaged in providing fire protection for persons and property." The job specification also states that the duties and responsibilities of a Battalion Fire Chief include, but are not limited to, "[a]t fires, takes charge of responding companies, deploys firefighting forces, orders needed reinforcements, and supervises firefighting activities," "[m]akes periodic inspections of firefighting personnel and equipment to ensure efficient performance," "[c]onducts training classes for subordinate fire officers and firefighters," "[s]upervises the establishment of records and files," "[p]lans, organizes, and assigns work of the organizational unit and evaluates employee performance and conduct, enabling the effective recommendation of the hiring, firing, promoting, and disciplining of subordinates." The job specification also requires that Battalion Fire Chiefs must have the, "[a]bility to supervise the performance of firefighters at fires and the use of equipment and apparatus."

Job Specification 01836 for Fire Captain states that a Fire Captain, "[u]nder direction, has charge of a fire department

company intended to assist in the extinguishing of fires." The job specification also states that the duties and responsibilities of a Fire Captain include, but are not limited to, "[m]akes command at fires until the arrival of superior officers," "[d]irects the work of firefighters engaged in extinguishing fires," "[p]reserves order and discipline among subordinates," "[g]ives assignments and instructions, and provides staff with needed advice and assistance when difficult and unusual problems arise," "[c]hecks the work of subordinates to see that proper procedures are followed, that reasonable standards of workmanship, conduct, and output are maintained, and that desired objectives are achieved," "[m]akes daily inspections of the company and its equipment," "[m]anages work operations and/or functional programs, and has responsibility for employee evaluations and for effectively recommending the hiring, firing, promoting, demoting, and/or disciplining of employees," "[a]ssigns firefighters to inspect schools, theaters, offices, and other buildings," "[p]repare reports of fires, equipment, and personnel." The job specification also requires that Fire Captains must have the, "[a]bility to organize the work of an assigned company so as to make the best available use of personnel, funds, and equipment," and the "[a]bility to give assignments to firefighters."

By certification dated June 20, 2017, William DiLorenzo, who is a Battalion Chief with the City's fire department and is the president of Local 198, certifies that he objects to the constitutionality of the MSRA, and the authority and actions taken pursuant to the MSRA. He also certifies that the Battalion Fire Chiefs, Deputy Fire Chiefs, and Fire Captains have supervisory authority only over certain titles. He further certifies about the platoons and shifts Local 198's members work in, what the duties of certain titles are, who can prefer charges, who can hire and fire, and who is evaluated by whom.

On August 16, 2017, I wrote to the parties and advised I was inclined to grant the City's petition by removing the Fire Captain, Battalion Chief, and Deputy Fire Chief titles from Local 198's unit. In the August 16 letter, I also invited the parties to respond if they disagreed with my factual and/or legal determinations.

In response, we received a letter from Local 198 dated August 23, 2017. In that letter, Local 198 renewed its request that the matter "be dismissed as untimely or deferred until Local 198's litigation with the City and the State of New Jersey challenging the [MSRA] is resolved," and renewed its request for an evidentiary hearing. In support of its requests, Local 198 objected to the Commission's procedural handling of the matter, and objected to the Commission's reliance on the Richardella

Certification. Local 198 also submitted a second Certification of William DiLorenzo dated August 23, 2017, and argued that the proposed decision failed "to consider the long-term acting out-of-title issues plaguing" the Atlantic City Fire Department. Local 198 also states that the State of New Jersey "has unilaterally implemented a contract which is set to expire December 31, 2021," and therefore, if the disputed titles are severed from the current unit, that removal should not be effective until December 31, 2021.

In reply to Local 198's August 23 letter, we received a letter from the City dated September 5, 2017. In that letter, the City supported the August 16 proposed decision, but requested that the effective date of any severance should be December 31, 2014, to relate back to the expiration date of the collective negotiations agreement in existence at the time of the filing of the clarification of unit petition.

ANALYSIS

This matter presents a unique and unprecedented action taken by the State on November 9, 2016, pursuant to the MSRA, to assume the powers of the governing body of the City, including the power to restructure or terminate collective negotiations agreements.

The MSRA, N.J.S.A. 52:27BBBB-1 et seq., vests exclusively in the Director of the Division of Local Government Services ("Director"), or his designee, "any of the functions, powers,

privileges, and immunities of the governing body. N.J.S.A. 52:27BBBB-5(a)(1), N.J.S.A. 52:27BBBB-7. It grants the Director "the authority to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization." MSRA "empowers the Director to take a variety of actions to stabilize the City's financial condition" such as

unilaterally appointing, transferring, or removing employees of the municipality in need of stabilization and recovery, including, but not limited to, department heads and division heads, as the case may be, but excluding appointed officials who have obtained tenure in office; provided, however, that the provisions of Title 11A, Civil Service, shall not apply to any employment action under this paragraph; N.J.S.A. 52:27BBBB-5(3)(k).

The MSRA further grants the Director, or his designee, authority to implement "governmental, administrative, and operational efficiency and oversight measures," unilaterally modify collective negotiations agreements and terms and conditions of employment, and unilaterally appoint, transfer or remove employees. N.J.S.A. 52:27BBBB-3, N.J.S.A. 52:27BBBB-5(a)(3), N.J.S.A. 52:27BBBB-7. Furthermore, the MSRA is to be construed liberally to give effect to its intent that severe fiscal distress be addressed and corrected. N.J.S.A. 52:27BBBB-13.

Local 198's challenge to the constitutionality of the all-encompassing MSRA cannot be decided by PERC. PERC must presume

that the MSRA is constitutional, unless and until a court determines otherwise. Rather, PERC is constrained to abide by the Director's authority pursuant to the MSRA mandate in making any determination regarding the City's fire department. Thus, Richardella's certification regarding the duties and responsibilities of the disputed titles and structure of the fire department is controlling.

N.J.S.A. 34:13A-5.3 provides in pertinent part that

except where established practice, prior agreement, or special circumstances dictate the contrary, . . . any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall not] have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership . . .

In Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 425-427 (1971), the New Jersey Supreme Court held that public employees who exercise significant power and responsibilities over other personnel should not be included in the same negotiations unit as their subordinates because of the conflict of interest between those employees and their supervisors.

In Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987), the Commission reaffirmed its long line of cases holding that we will ordinarily find a conflict of interest between superior officers and rank and file officers in a police

department. In Union City, P.E.R.C. No. 70, NJPER Supp. 295, 297 (¶70 1972), cited in West New York, the Commission explained:

It is readily observable that the military-like approach to organization and administration and the nature of the service provided (which presumably accounts for that approach) set municipal police and fire departments apart from other governmental services. . . . When the Commission is asked to draw the boundaries of common interest in this class of cases, it cannot ignore this background as it examines for evidence of whether or not a superior exercises any significant authority over a rank and file subordinate which would or could create a conflict of interest between the two. . . . We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimis, such as might not unreasonably be expected to exist in a small police or fire department. [Union City at 350 (emphasis added).]

Thus, for over forty years, we have held that the inclusion of both police and fire superior officers in rank and file units creates an impermissible conflict of interest.

In West New York, the Commission also cited with approval Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), in which the Director of Representation found:

. . . except in very small departments where any conflict of interest between superior officers and rank and file personnel is de minimis in nature, the quasi-military structure of police departments virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant authority in a chain of command operation produces an inherent conflict of interest

within the New Jersey Supreme Court's definition of that concept in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3. [Id. at 349.]

* * *

Accordingly, in cases involving police department unit, superior officers will normally be severed from rank and file personnel unless it is shown that there is an exceptional circumstance dictating a different result. Examples of such are the following: (1) A department in which there is a very small force where superior officers perform virtually the same duties as patrolmen, and where any conflict of interest is de minimis in nature; (2) Where it is determined that superior officers are supervisors, the existence of established practice, prior agreement or special circumstances dictate the continued inclusion of superior officers in a unit of rank and file personnel. [Id. at 350 (footnotes omitted).]

In West New York, the Commission ordered that superior officers be removed from the unit based upon the potential for a conflict of interest with rank and file officers, despite a history of a long relationship in one combined unit, and notwithstanding that the employer did not assert that an actual conflict existed. The Commission removed the superiors even in

the absence of direct evidence of actual conflict - - "where a superior officer was actually torn between his divided loyalties to his employer and his unit, thus damaging the public interest" - - finding that such a standard, i.e., actual conflict, is "too exacting and is inconsistent with West Paterson, especially when public safety employees are involved." West New York at 13 NJPER 279 (citing West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973)). The Commission wrote:

Rather, we believe severance is appropriate for uniformed employees even where there has been an 'established practice' where, as here, the employee's job responsibilities place him in a substantial conflict of interest with his subordinates. [West New York at 279.]

Here, pursuant to the Legislative mandate in the MSRA, Richardella determined that the City's fire department is to operate as a paramilitary organization. See City of Hoboken, P.E.R.C. No. 2016-79, 42 NJPER 559 (¶154 2016) ("[A] nexus exists between the alleged misconduct and the workplace given the paramilitary structure of the fire department and the special need to maintain order and discipline because the work is inherently dangerous and requires mutual trust and cooperation"); Monroe Tp. Bd. of Fire Commissioners, P.E.R.C. No. 98-158, 24 NJPER 347 (¶29165 1998) (referencing hearing examiner's note that "consistent with the practice in para-military organizations, the executive director/captain is performing the lieutenant's duties

as the next ranking officer"); State of New Jersey, H.O. No. 86-1, 11 NJPER 635 (¶16224 1985) ("These activities of the Supervising Forester (Fire) classification, within the paramilitary setting of the Bureau, engender the conflicts of interest which Wilton deemed inappropriate."), adopted by P.E.R.C. No. 86-98, 12 NJPER 206 (¶17081 1986), rev'd 222 N.J. Super. 475 (App. Div. 1988), rev'd and PERC order reinstated sub nom. In re Matters of State, 114 N.J. 316 (1989).^{3/}

We presume that in paramilitary organizations, such as fire departments, an inherent potential conflict of interest exists between superior officers and rank and file uniformed personnel. The presumption is not dependent upon a finding of the supervisory status of superiors or upon the presence of actual conflict among the groups. An exception may be found in small units if the duties and authority of superiors and rank and file are virtually identical so that any potential for conflict between the ranks is de minimis. See Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1993), affirming H.O. No. 93-1, 19 NJPER 39 (¶24018 1992). This situation is normally found in a very small fire department, where the lines of demarcation between ranks is slight. See Pine Valley Borough, D.R. No. 99-

3/ See also N.J.S.A. 40A:14-54 ("The members and officers of the paid or part-paid fire department and force of a municipality shall have the powers and authority of police officers within the municipality, to be exercised while going to, attending and returning from a fire.")

15, 25 NJPER 269 (¶30114 1999) (unit of three (3) patrolmen and one (1) sergeant appropriate where sergeant is not a statutory supervisor and performs the same duties as patrolmen); Township of Greenwich, D.R. No. 99-7, 25 NJPER 61 (¶30023 1998) (small force exception applied where all ranks of small department have interchangeable responsibilities); Borough of Audubon Park, D.R. No. 88-6, 13 NJPER 741 (¶18278 1987) (small force exception applied to unit of one (1) sergeant and two (2) patrolmen); Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11147 1980) (unit appropriate where sergeant has no greater authority than patrol officers in ten (10) member department).

In this case, I find that the Fire Captain, Battalion Chief and Deputy Fire Chief should be separated from the existing unit. Impermissible potential conflicts of interest exist between the Fire Captain, Battalion Chief and Deputy Fire Chief and rank and file members.

First and foremost, Richardella has determined pursuant to the MSRA's mandate that the New Jersey Civil Service Commission's Job Specifications will be adhered to for Deputy Fire Chief, Battalion Fire Chief, and Fire Captain and details the numerous duties and responsibilities of these titles. These include the supervision of rank and file uniformed fire personnel, including the authority to direct assignments and impose discipline.

Furthermore, beyond the job specifications^{4/} that clearly describe the supervisory authority of these titles, the parties' submissions also support the finding that Deputy Fire Chiefs, Battalion Chiefs and Fire Captains actually supervise employees in lower ranked titles in their daily activities. Specifically, Richardella certifies on behalf of the City that Fire Captains supervise the day-to-day activities of Firefighters, Battalion Fire Chiefs supervise the day-to-day activities of Fire Captains and Firefighters, and Deputy Fire Chiefs supervise the day-to-day activities of Battalion Fire Chiefs, Fire Captains and Firefighters, but all supervisory authority "is now subject to the powers vested in" MSRA.

Similarly, Local 198 submits that during a work tour, "each Fire Captain is responsible for directing three firefighters during an emergency response, Battalion Chiefs direct the Fire Captains, Deputy Fire Chiefs direct the Battalion Chiefs, and the Fire Chief directs everyone," and that, "[a]ny supervisory duty is limited to a chain of command for fire suppression and other emergency responses." Indeed, on behalf of Local 198, DiLorenzo

^{4/} Notably, the Division of Fire Safety in the Department of Community Affairs, in its recommendations of courses to ensure compliance with the National Incident Management System, refers to Captains as "First Line Supervisors," Battalion Chiefs as "Middle Managers," and Deputy Chiefs as "second in command."
www.nj.gov/dca/divisions/dfs/pdf/announcements/fire_officer_requirements_2015.pdf

certifies that "Fire Captains supervise day-to-day activities of Fire Fighters," "Battalion Fire Chiefs supervise the day-to-day activities of Fire Captains only," and "Deputy Fire Chiefs supervise the day-to-day activities of the Battalion Fire Chiefs only."^{5/}

Not only does Richardella certify regarding the authority of Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains to discipline lower-ranked employees, Richardella also attaches examples of disciplinary actions taken and recommended by Deputy Fire Chiefs, Battalion Fire Chiefs and Fire Captains. These examples include a Deputy Fire Chief recommending discipline of a Firefighter to the Acting Fire Chief, a Battalion Fire Chief recommending discipline of a Firefighter recruit to the Fire Chief, a Fire Captain recommending discipline of a Firefighter recruit to the Fire Chief, a Battalion Fire Chief and a Fire

^{5/} Local 198 also contends that this matter is procedurally tainted due to the timing of the initial decision. This is inaccurate and is without sufficient merit to warrant discussion. Local 198 also contends acting out-of-title issues need to be considered because some Firefighters are acting in the disputed titles. Anyone who performs the work of the disputed titles will be excluded from the rank-and-file because their inclusion constitutes a conflict. Finally, Local 198 contends that the three-year-old petition should not be considered. A CU determination is made to promote stability. Indeed, the "public interest requires that disputes as to the composition a unit be resolved in as forthright and prompt a manner as possible." Clearview Regional High School Bd of Ed., *ibid.*

Captain recommending discipline of two Firefighter recruits to a Deputy Fire Chief.

In Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116 1996), the Director of Representation severed superior officers from a unit of police patrol officers. In so doing, the Director found that the size of the Department, which was approximately two hundred (200) police personnel, and the superiors' exercise of authority to discipline and direct work assignments of the rank and file officers created an intolerable conflict of interest. This finding was made despite a twenty-six (26) year relationship between the Township and a unit that included all police officers except the chief and deputy chief, and without any evidence of an actual conflict of interest.

The facts of this matter do not meet the small force exception. The City's fire department has approximately 286 fire personnel, the Fire Captain, Battalion Chief and Deputy Fire Chief have authority in this paramilitary organization to discipline, and are responsible for exercising supervisory authority over subordinate officers.

No special circumstances support the continuation of the historic unit. Although the parties have a long history of a combined unit of the Fire Captain, Battalion Chief and Deputy Fire Chief with rank and file fire personnel, that history does not overcome the potential conflict or harm to the public

interest. West New York, 13 NJPER 277 (¶18115 1987); See also Woodbridge Tp., 22 NJPER 216 (¶27116 1996).

Given the conflict of interest created by the inclusion of the Fire Captain, Battalion Chief and Deputy Fire Chief with the rank and file, I hereby remove the Fire Captain, Battalion Chief, and Deputy Fire Chief titles from Local 198's unit. As noted above, this decision is based on several factors, including: (1) Richardella's certification; (2) DiLorenzo's certifications; (3) the Act; and (4) the MSRA.

In my August 16, 2017 letter to the parties, I indicated my intention that the effective date of the removal be December 31, 2017, the expiration date of the last contract signed between the parties. I based my initial intention on language from Clearview Regional High School Bd. of Ed. ("Clearview"):

(2) The Commission will accept clarification of unit petitions filed by parties at any time during the life of their contract which seek to exclude personnel whom the parties by mutual agreement had previously included in the contract even though, at the time of their inclusion, they were statutory supervisors . . . and notwithstanding the existence of substantial, actual conflict or the potentiality for substantial conflict of interest . . . the mutual agreement of the parties to include these categories under the contract has created 'special circumstances' which dictate that these categories continue to be included in the unit during the life of the contract. The 'special circumstances' which the parties have created would terminate at the conclusion of the contract. Therefore, a Commission determination to exclude personnel from such a mixed unit for

the reasons stated above shall become effective upon the expiration of the contract, unless the parties mutually agree otherwise. [D.R. No. 78-2, 3 NJPER 248 (1977).]

Local 198, in its August 23, 2017 response to my letter, states that "[t]he State of New Jersey has unilaterally implemented a contract which is set to expire December 31, 2021." Although disputing the validity of this "contract," Local 198 argues that any removal should therefore not be effective until December 31, 2021. The City, in its September 5, 2017 response, argues that the removal should relate back and be effective as of December 31, 2014, the expiration date of the contract in effect at the time the clarification of unit petition was filed. Upon further consideration, I find that neither of the dates proposed by the parties, nor December 31, 2017, which was the effective date indicated in the proposed decision, apply to the facts here.

Rather, the following language from Clearview is applicable:

(5) In all cases where the clarification of unit question is raised before the Commission prior to the execution of the parties' most recent contract, . . . the clarification of unit determination shall be effective immediately;

When used above, the term "execution of the parties' most recent contract" means the last act which would formally bind both parties to a negotiations agreement. [D.R. No. 78-2, 3 NJPER 248 (1977).]

The instant clarification of unit question was raised before the Commission upon the filing of the petition on September 8, 2014. This was prior to the execution of the parties' 2015-2017 contract,^{6/} whether determined from the date of the mayor's signature on March 28, 2016, or the City's adoption by resolution on May 18, 2016. The date proposed by Local 198 is also not consistent with Clearview. Therefore, in accordance with Clearview, this clarification of unit determination shall be effective immediately.^{7/}

/s/Daisy B. Barreto
Daisy B. Barreto, Esq.
Acting Director of Representation

DATED: September 13, 2017
Trenton, New Jersey

c: Timothy Cunningham, Director, DLGS
Jeffrey S. Chiesa, DLGS State Designee
Gregory Franklin, Esq.

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by September 25, 2017.

6/ It is therefore not necessary to determine whether the City's unilateral imposition of new terms and conditions of employment pursuant to its authority under the MSRA constituted a new "contract", nor what effect, if any, the new contract would have had on the removal effective date.

7/ Upon removal, the Fire Captains, Battalion Chiefs and Deputy Fire Chiefs will be unrepresented unless or until a majority representative is recognized or certified.

